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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY _____
DEPUTY

BNCC, INC.,

Appellant
(Defendant, Third-Party Plaintiff)

v.

ACCESS ELECTRIC SUPPLY, INC.

Respondent
(Plaintiff, Third-Party Defendant)

2012 SEP 10 PM 3:00
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

APPELLANT BNCC, INC.'S OPENING BRIEF

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I. INTRODUCTION

By order dated November 16, 2011, the trial court granted BNCC's Motion for Partial Summary Judgment and dismissed all of Access Electric's claims against BNCC. (CP 251-53.) Those claims had no basis in law. Access Electric, having lost its rights to seek a recovery from bond and retainage on a public work (which was the only possible basis on which Access could have made a colorable claim against BNCC), asserted claims on several theories that failed as a matter of law. The trial court properly dismissed those claims.

BNCC thereafter asserted that it was entitled to attorney's fees to recover the cost of defending against Access Electric's dismissed claims. There are at two bases for an award of interest, costs, and attorneys' fees against Access. First, Access Electric's claims were frivolous. Access was a supplier to subcontractor on a public work. The caselaw makes clear that such a party's right to sue the general contractor (such as BNCC) is provided only through the bond and retainage statutes, which require that suppliers follow a strict process (including providing certain notices to the general contractor). Suppliers have no other colorable cause of action against a general contractor when and if the subcontractor the supplier is supplying fails to pay. Access failed to provide the notices and

failed to otherwise pursue or perfect a bond and retainage claim.

Nonetheless, it sued BNCC directly. Those claims were frivolous, entitling BNCC to attorney's fees under CR 11 and RCW 4.84.185.

Second, one of the theories Access tried to pursue was that it was a third-party-beneficiary of the contract between BNCC and Kelly Electric (the subcontractor that failed to pay Access). Thus, Access Electric asserted contract rights under the BNCC/Kelly contract. By asserting contract rights, Access is exposed to the rights of others under the contract. Therefore, if the contract provided for an award of attorney's fees (as this one did through its indemnification clause), Access is liable for those fees. It is not a defense that Access was not a party to the contract or that Access Electric's attempt to assert rights under the contract was disallowed. Rather, because Access chose to assert a claim under the contract, it is exposed to the contractually-defined consequences of losing that claim. Accordingly, pursuant to RCW 4.84.330, BNCC was entitled to an award of interest and attorney's fees and costs against Access.

Despite this, the trial court first erroneously (but without any prejudicial effect) denied this fee request in denying BNCC's Second Motion for Summary Judgment. (CP 321-22.) However, the trial court

then seriously compounded this error in granting Access Electric's Motion for Summary Judgment, dismissing BNCC's claim for attorney's fees with finality. (CP 371-72.) The trial court, in making this ruling, explained that the ruling was driven by the Court's concern that it be "consistent" rather than by the conclusion of any argument or legal analysis. (RP 4/13/2012, p. 17, l. 18 – p. 19, l. 15.) This was error, both in privileging consistency over correctness and in failing to engage in the required and proper legal analysis, resulting in the erroneous denial of an attorney fee award to a party entitled to such an award.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in failing to award fees to BNCC under CR 11 and RCW 4.84.185 and in subsequently dismissing that claim for attorney's fees.

2. The trial court erred in failing to award fees to BNCC RCW 4.84.330 and in subsequently dismissing that claim for attorney's fees.

Issues Pertaining to Assignments of Error

1. Is the discretion of a trial court in granting or denying a request for fees under CR 11 or RCW 4.84.185 discretionary, but with

bounded discretion, requiring that the trial court apply a prescribed legal analysis as a guidance and pre-requisite to the exercise of discretion? Yes.

2. Is it reversible error for a trial court to exercise its discretion to grant or deny CR 11 or RCW 4.84.185 fees without engaging in the required legal analysis, requiring remand to the trial court to perform such analysis? Yes.

3. Is it a reversible error for a trial court to fail to award contractual attorney's fees under RCW 4.84.330 in favor of a party who prevails on a defense against a third-party-beneficiary claim asserting contractual rights under a contract that provides for an award of attorney's fees incurred in such defense? Yes.

III. STATEMENT OF THE CASE

BNCC is a general contractor registered and licensed to do business in Washington. BNCC entered into a contract with Issaquah School District No. 411, to build Elementary School No. 15. Thereafter, BNCC entered into a subcontract with Kelly Electric, Inc., to perform the complete electrical work on the school. The subcontract was signed by Kelly Electric, Inc., on June 18, 2009, and by BNCC on July 13, 2009. CP 40.

The subcontract included an indemnification addendum, where:

Subcontractor agrees to defend, indemnify and hold harmless Contractor from any and all claims, demands, losses, and liabilities to or by third parties, arising from, resulting from, or connected with work performed or to be performed under this Subcontract by Subcontractor, its agents, employees and sub-tier subcontractors and suppliers of any tier, even though such claim may prove to be false, groundless or fraudulent, to the fullest extent permitted by law and subject to the limitations provided below.

The indemnification addendum specifically included attorney fees:

Defense cost recovery shall include all fees (attorneys and experts) and costs and expenses. In addition, Contractor shall be entitled to recover compensation for all of its in-house expenses (including materials and labor) consumed in its defense.

CP 40.

Meanwhile, the president and owner of Kelly Electric, Inc., Mr. Pete Kelly, was selling the “business commonly known as Kelly Electric” to Mr. John L. Beer, who assigned his position in the deal to his company, South County Builders Inc.. CP 50 -85. The deal closed on or about September 10, 2009, and included the subcontract with BNCC. CP 50-90. John Beer’s company, South County Builders, Inc., started doing business as “Kelly Electric.” CP 105. No one sought or obtained written authorization from BNCC for assignment of the subcontract, and no one informed BNCC that John Beer had assigned his interest under the sale contract to South County Builders, Inc., or that South County Builders,

Inc., was a completely separate entity doing business as "Kelly Electric." Both Kelly Electric, Inc., prior to the sale, and South County Builders, Inc., dba Kelly Electric, performed work under the subcontract with BNCC. It appears that the subcontractor, whether Kelly Electric, Inc., or South County Builders, Inc., dba Kelly Electric, purchased electrical equipment from Plaintiff Access Electric Supply, Inc., to install in the project, but did not pay Access for the electrical equipment. CP 1-5; 179-186.

On August 19, 2010, BNCC received a Notice of Claim Against Payment Bond:

NOTICE IS HEREBY GIVEN that the undersigned, Access Electric Supply, Inc., has a claim in the sum of \$49,866.00 against the bond taken from Babbit Neuman Construction Company for work performed by Access Electric Supply, Inc., on the Elementary School No. 15 Project.

CP 134. This was the first notice that BNCC had received from Access concerning its claims. Access had filed no pre-claim notice.

On October 12, 2010, Mr. Howard Benzel, of Access Electric Supply, called Matt Nagel on the telephone. After the phone call, Matt Nagel wrote a letter to Mr. Benzel, stating:

I appreciate you taking the time to contact me this morning regarding the Issaquah Elementary School project. Based on this discussion, I understand that Access Electric Supply purportedly furnished materials to Kelly Electric to be used in the construction of the referenced project for which it has

not been paid. You advised me of Access Electric's intent to file a claim on the project for the unpaid amounts. You further informed me that Access Electric did not file a pre-claim notice on the project. Unfortunately, there are no remaining funds on the Kelly Electric account. In fact, BNCC will incur substantial costs as a result of their insolvency.

CP 140.

Similarly, on November 30, 2010, Mr. Echigoshima of Liberty Mutual, the surety on BNCC's bond, wrote to Mr. Ferring, counsel for Access, stating:

It is my understanding that Matt Nagel of Babbit Neuman has previously contacted you to advise that they lack documentation supporting your right to make claim on the bond. Unless you can provide the information he was asking for we must deny your claim at this time.

CP 142.

On November 12, 2010, Access filed this lawsuit against BNCC, serving BNCC on December 6, 2010. In its complaint, Access pled the following:

5. BNCC entered in a subcontract agreement with Kelly Electric, ("the subcontract"). Under the terms of the subcontract, Kelly Electric was to perform electrical work and supply electrical equipment and materials in connection with the Elementary School No. 15 project.

6. The subcontract required that BNCC pay for all labor and materials provided under the subcontract. The subcontract also provided that such payments constitute a trust fund in favor of all materialmen and lower tier subcontractors.

10. ... BNCC has not paid Access or Kelly Electric [pursuant to the terms of the subcontract] for the equipment which Access provided.

13. BNCC would be unjustly enriched by being allowed to keep the monies that it received for the equipment provided by Access without paying Access or Kelly [pursuant to the terms of the subcontract] for that equipment.

16. BNCC received progress payments from the Issaquah School District for work and materials performed and provided by BNCC's subcontractors and suppliers. Under the terms of the BNCC subcontract, those payments constituted a trust fund in favor of lower tier subcontractors and suppliers who are legally entitled to claim against subcontractors for work or materials provided under subcontract.

21. Access is third party beneficiary to the subcontract between BNCC and Kelly Electric.

22. Access performed its contractual obligations. BNCC benefited from Access's performance.

23. BNCC breached its subcontract by failing to pay for the equipment and materials Access provided. Access would have benefited by BNCC fulfilling its obligations under the subcontract.

24. As third party beneficiary, Access is entitled to enforce the subcontract and compel payment by BNCC.

CP 1-5.

BNCC answered and counterclaimed on August 19, 2011. In its counterclaim, BNCC alleged:

8. Plaintiff has sued BNCC, making claims

arising from the work performed under the subcontract.

9. Plaintiff failed to provide BNCC with preclaim notice, the only method provided for by law for a second-tier supplier to make claim against a general contractor for a subcontractor's failure to pay. Having failed to provide such preclaim notice, all of plaintiff's claims against BNCC are frivolous.

CP 6-11.

In its Prayer for Relief, BNCC prayed for "interest, costs, and attorneys' fees against Plaintiff as allowed by rule and statute, including CR 11 and RCW 4.84.185." CP 11.

BNCC moved for summary judgment, seeking dismissal of all of Access's claims against it. CP 12-19; CP 207-215; 239-246. On October 28, 2011, the trial court granted that motion and dismissed the Access claims. CP 251-252. Thereafter, BNCC moved for summary judgment seeking an award of fees. CP 254-266; CP 274-307; 308-315. On January 30, 2012, the trial court denied that Second motion for Summary Judgment. However, the trial court did not grant summary judgment to Access, as the nonmoving party, and the Court's order does not indicate that the denial of BNCC's Second Motion for Summary Judgment was otherwise intended to dispose of the arguments or claims made by BNCC in favor of Access. Rather, the Order merely states that "BNCC Inc.'s Second Motion for Summary Judgment [is] DENIED." CP 321-322.

Thereafter, Access Electric filed a Motion for Summary Judgment, in which it specifically stated, contrary to its previous position in response to BNCC's request for fees, that the fee issue was ripe for resolution on summary judgment. CP 323-343. The trial court granted that motion, apparently without any legal analysis, but merely on the basis that any other ruling would not be "consistent" with the Court's previous denial of BNCC's Second Motion for Summary Judgment seeking fees. CP 371-372; (RP 4/13/2012, p. 17, l. 18 – p. 19, l. 15.)

IV. ARGUMENT

A. The Standard of Review is *de novo*

When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the trial court. Failor's Pharmacy v. DSHS, 125 Wn.2d 488 at 493, 886 P.2d 147 (1994). The Court of Appeals will affirm the summary judgment only if there are no genuine issues of material fact between the parties and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. Id. All facts and all reasonable inferences from those facts are considered in the light most favorable to the party resisting summary judgment. Id. The burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact.

Morris v. McNicol, 83 Wn.2d 491 at 494, 519 P.2d 7 (1974). Summary judgment is sustainable on review only if reasonable minds could reach but one conclusion from the evidence, and only if the conclusion thus reached entitles the moving party to a judgment in its favor. Failor's Pharmacy at 493.

"When a trial court rules as a matter of law, it must accept the [non-moving party's] evidence as true, and determine whether or not the [non-moving party] has a prima facie case." Spring v. Department of Labor and Industries, 96 Wn.2d 914, 918, 640 P.2d 1 (1982). The trial court should not make factual determinations or evaluate the non-moving party's evidence, except as may be necessary to favorably resolve conflicts appearing therein. See Spring v. Dept. L&I, 96 Wn.2d at 918.

On these principles, the summary judgment in favor of Access Electric was improper and should be reversed by this Court with a remand for such further proceedings as are necessary. However, summary judgment in favor of BNCC on the merits was properly granted, and based on that ruling BNCC is entitled to fees (at least on the third-party beneficiary-claim) as a matter of law. Therefore, this Court should reverse the trial court and remand for a determination and award of fees to BNCC.

B. **CR 11**

The signature (on a pleading or other filed document) of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11 [in relevant part].

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

RCW 4.84.185.

The basic standard under both these rules is substantially identical.

A legal action is frivolous if a reasonable inquiry would show that the action is it is not "well grounded in fact and is [not] warranted by existing

law or a good faith argument for the extension, modification, or reversal of existing law, [or] that it is [] interposed for any improper purpose.”

In this case, while Access Electric has a very real claim against Kelly Electric, Access had no colorable, nonfrivolous claim against BNCC. Despite that, Access sued BNCC on several specious claims, all of which were dismissed by the trial court on BNCC’s Motion for Summary Judgment. However, BNCC incurred substantial attorney’s fees defending against those frivolous claims and putting together the legal briefing that resulted in their dismissal. BNCC is entitled to an award of attorney’s fees to compensate it for the cost of this defense.

While Kelly Electric did not pay Access, and while Access has a legitimate right to complain about that nonpayment, Access cannot seek payment from and formally pursue litigation against nonliable parties (as it did here, with BNCC):

[A] defendant drawn into an action without reasonable cause and subjected to claims against it that, considered as a whole, are frivolous, may be awarded expenses under RCW 4.84.185, regardless of the merit of the plaintiff’s claims against other defendants.

Eller v. East Sprague Motors & R.V.’s, Inc., 159 Wn. App. 180, 194, 244 P.3d 447 (2010). BNCC is just such a defendant, named as such by Access in this action without reasonable cause.

BNCC does not have to show that Access made filings for an improper purpose. Rather, BNCC must show, and has shown, that Access Electric's claims were not well grounded in fact or law, or made with a good faith argument for the extension or modification of existing law.

Access Electric did not file a pre-claim notice. The statute reads:

[N]o suit or action shall be maintained in any court against the retained percentage to recover for such materials, supplies, or provisions or any part thereof unless the provisions of this section [requiring pre-claim notice] have been complied with.

RCW 60.28.015.

Access Electric, not having filed a pre-claim notice, pursued claims against BNCC that had no basis in fact or in law. Further, Access made no argument for extension or modification of existing law (such argument being contrary to the clearly articulated purposes of the notice provision in the bond and retainage act and the clear current of the caselaw interpreting those acts). Therefore, BNCC is entitled to attorney's fees, and the trial court erred in not awarding them.

The decision to impose sanctions under CR 11 is generally discretionary. Eller, 159 Wn. App. at 189. Similarly, an award of attorney fees under RCW 4.84.185 is also generally discretionary of the trial court. Eller, 159 Wn. App. at 192. Therefore, the trial court arguably

exercised its discretion in not awarding attorney's fees under CR 11 and RCW 4.84.185.

However, both CR 11 and RCW 4.84.185 prescribe a legal analysis which the trial court is to use when exercising its discretion, and the result of that analysis is to inform that discretion. Washington Courts look to Federal authority for guidance in applying CR 11, as Washington's rule is based on the Federal rule. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210 at 218-219, 829 P.2d 1099 (1992). Ordinary deference given to trial courts is tempered in the CR 11 context. (See In re Ronco, Inc., 838 F.2d 212 at 217-218 (7th Cir. 1988). A trial court's failure to engage in an appropriate degree of scrutiny or care in hearing a CR 11 motion is grounds for reversal, for reconsideration if not for entry of an alternative ruling. Bryant 119 Wn.2d at 222; Operating Engineers Pension Trust v. A-C Co., 859 F.2d 1336 at 1345 n. 13 (9th Cir. 1988).

Here, the trial court granted Access Electric's Motion for Summary Judgment not because its CR 11 analysis warranted that ruling, but rather because it believed that such a ruling, and no other ruling, would be "consistent" with its previous denial of BNCC's Second Motion for Summary Judgment, in which BNCC sought fees on its own motion. Leaving aside the ambiguity about the basis for the denial of that motion

(which appears to be an alleged dispute as to fact that was stipulated to be nonexistent in Access Electric's Motion for Summary Judgment), mere consistency is not a proper standard. Judicial rulings should be right, and consistent insofar as they are right. Elevating consistency over correctness will have the result of making the Court consistently wrong rather than right where, as here, the Court makes a minor misstep in an earlier ruling but then bases a more significant ruling on that previous, otherwise insignificant mistake.

C. **Third-Party-Beneficiary Claim.**

RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

This statute applies here.

Because RCW 4.84.330 applies here, the trial court was required to award fees and costs (and interest on the judgment), to BNCC. Unlike fees under RC 11 and RCW 4.84.185, fees under RCW 4.84.330 are not discretionary. It was plain, reversible error for the trial court to deny BNCC's request for fees and further grant Access Electric's request that the claim be dismissed.

The language of RCW 4.84.330 is mandatory; it does not allow for an exercise of discretion in deciding whether to award fees. The only discretion is as to the amount. Farm Credit Bank v. Tucker, 62 Wn. App. 196, 207, 813 P.2d 619 (1991). The contract containing the attorneys fees provision must be central to the controversy. Hemenway v. Miller, 116 Wn.2d 725, 742, 807 P.2d 863 (1991).

CHD, Inc. v. Boyles, 138 Wn. App. 131, 140-41, 157 P.3d 415, 419 (2007).

The subject subcontract has an applicable attorney's fees clause (here, the indemnification addendum). This clause reads:

Subcontractor agrees to defend, indemnify, and hold harmless Contractor for any and all claims...by third parties arising from ...work performed...under this Subcontract...even though such claim may prove to be...groundless..., to the fullest extent permitted by law....

CP 40.

The indemnification addendum also specifically defines defense cost recovery as including "all fees (attorneys and experts) and costs and expenses." CP 40.

Access Electric asserts that it is not subject to this attorney's fee provision because it is not the "Subcontractor" (or even a party to the Subcontract). However, even though Access was not party to the Subcontract, Access asserted claims and rights under that Subcontract. Indeed, Access asserted that it was the third-party-beneficiary to the

Subcontractor's rights, essentially claiming that, for purposes of this Subcontract, it stood in the shoes of the Subcontractor. However, in doing so, Access subjected itself to the risk of liability under the Subcontract claim provisions (including the attorney's fees clause.

In Washington, litigants cannot assert contract rights and claims with impunity. Asserting such claims exposes the party asserting them to contractual attorney's fee provisions. Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn. App. 188, 194-97, 692 P.2d 867 (1984). The test is whether the Plaintiff could have recovered contractual attorney's fees if the Plaintiff had prevailed on the claim. If so, then the Plaintiff is subject to attorney's fees if the Defendant prevails on the claim.

Third-party-beneficiaries are entitled to contractual attorney's fees if they prevail. Deep Water Brewing, LLC, v. Fairway Res. Ltd., 152 Wn. App. 229, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024, 230 P.3d 1038 (2010). Because Access Electric would have been entitled to fees under RCW 4.84.330 if it had prevailed as a third-party-beneficiary of the Subcontract, Access is subject to attorney's fees because BNCC prevailed on Access Electric's third-party-beneficiary contract claim.

BNCC is the prevailing party here. This is exactly analogous to the situation in Herzog Aluminum. Herzog, 39 Wn. App. at 197. This Court should award BNCC its attorney fees and costs.

C. **Fees on Appeal**

RAP 18.1 allows the award of attorney fees on appeal if authorized by applicable law. A contractual provision authorizing attorney fees is authority for granting fees incurred on appeal. Marassis v. Lau, 71 Wn. App. 912, 920, 859 P.2d 605 (1993). For the reasons stated above, BNCC is entitled to an award of fees on appeal as well as fees below.

V. CONCLUSION

Access Electric would have had a remedy against BNCC for the breaches by either Kelly Electric, Inc., or South County Builders, Inc., dba Kelly Electric under the public works bond and retainage statutes. All Access had to do would have been to submit a pre-claim notice to BNCC; but Access did not file a pre-claim notice. The legislature, in enacting a statute designed to protect suppliers like Access, foreclosed all other remedies. The statute is very clear: “no suit or action shall be maintained in any court against the contractor or his or her bond to recover for such materials, supplies, or provisions or any part thereof unless the provisions of this section have been complied with.” RCW 39.08.065.

Despite this clear prohibition, Access filed suit – a frivolous suit – and asserting shotgun blast of common law claims against BNCC: quantum meruit, unjust enrichment, and third-party-beneficiary contract rights. All of those claims were foreclosed by the fact that the legislature provided Access with a sole means of recovery against BNCC: Chapters 39.08 and 60.28 RCW.

At a hearing on BNCC's first Motion for Partial Summary Judgment, the trial court properly dismissed Access's claims against BNCC. The trial court thereafter erred, first refusing to award BNCC its defense costs and then foreclosing such an award on Plaintiff's Motion for Summary Judgment.

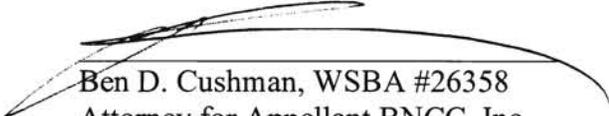
The trial court's refusal to award fees under CR 11 and RCW 4.84.185 was an abuse of discretion because the trial court failed to follow the prescribed legal analysis for such fee awards. The remedy is to remand to the trial court with instructions that it perform the proper analysis and then award, or deny award, based on the conclusion it reaches. Until the analysis is done, denial of a fee award is premature and not supported by law.

However, the trial court's refusal to award fees under RCW 4.84.330 is both easier to resolve and more serious. Such an award is not

discretionary. Therefore, this Court should simply reverse the trial court, award fees on appeal and remand this matter to the trial court for an award of fees incurred defending against Access Electric's Third-Party-Beneficiary claim.

SUBMITTED this 10th day of September, 2012.

CUSHMAN LAW OFFICES, P.S.



Ben D. Cushman, WSBA #26358
Attorney for Appellant BNCC, Inc.

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On September 10, 2012, I caused the foregoing document to be e-filed with this Court and emailed and mailed to the party as listed below:

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